NO. 84-5372

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that a state may constitutionally deny a prison inmate any remedy for physical injuries suffered as a result of the negligence of a state prison employee, regardless of the seriousness of the injuries suffered, and in holding that a prisoner has a constitutionally protected interest only in his tangible property, not in his body?

2. Did the court of appeals err in holding that, even were it to find that a prisoner has a constitutionally protected interest in his body, this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), extends to liberty as well as property interests and bars a suit under 42 U.S.C. § 1983 for damages by a prisoner alleging injuries as a result of the negligence of a state prison employee as long as a state remedy exists?

3. Did the court of appeals err in holding that a meaningful state remedy, as required by this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), was available to a state prisoner who alleged personal injuries resulting from the negligence of a state prison employee where the prisoner sued the employee in state court as well as federal court, the employee relied on a defense of sovereign immunity, the employee declined to abandon that defense before the en banc court of appeals, and the court of appeals could not guarantee that sovereign immunity would not, in fact, bar the prisoner's recovery in state court?

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NO. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROY E. DANIELS,
Petitioner,

vs.

ANDREW WILLIAMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the en banc United States Court of Appeals for the Fourth Circuit is not yet reported, but it is contained in Appendix I to this petition. The panel opinion of the court of appeals is reported at 720 F.2d 792 (4th Cir. 1983), and is contained in Appendix II. The order of the United States District Court for the Eastern District of Virginia, granting summary judgment against Petitioner, is unreported, but is contained in Appendix III.

JURISDICTION

Judgment in the court of appeals was entered on November 16, 1984. Jurisdiction in this Court is grounded in 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts of this case are simple. Roy Daniels, Petitioner, was a prisoner in the Richmond city jail on January 23, 1982. He claims that on that day he slipped and fell on a pillow and newspapers negligently left by the Respondent on stairs which Daniels used. Petitioner brought an action against Respondent in state court in which Respondent alleged sovereign immunity as a defense, and Petitioner also filed a civil rights suit in federal district court in which Respondent reiterated his defense of sovereign immunity.

Petitioner alleged in his suits that he injured his back and his ankle when he fell and that the injuries were caused by Respondent's negligence. The lower courts found that Petitioner could not proceed with his federal action, even assuming that he could prove what he alleged.

The United States District Court for the Eastern District of Virginia held that this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981), barred a federal action, since Petitioner could proceed with his negligence claim in state court. (App. III). A panel of the United States Court of Appeals for the Fourth Circuit agreed, but the court of appeals granted a rehearing en banc. Following reargument, a majority of the panel reaffirmed the conclusion that Petitioner could not proceed with this federal action, but the majority reached its result through a very different analysis than the one used by the district court and the panel.

The majority of the court of appeals decided three separate issues against Petitioner: First, a 5-4 majority found that the Commonwealth of Virginia would not violate Petitioner's Fourteenth Amendment rights if it denied him an opportunity to seek a meaningful remedy against a state officer whose negligence resulted in injuries, even serious ones, to Petitioner's body. This majority reasoned that an injury to a prisoner's person, no matter how serious, does not require the meaningful post-

deprivation remedy that this Court found necessary following a $23.50 negligence-based property loss in Parratt v. Taylor. Second, the en banc court unanimously agreed that, even if a prisoner is entitled to some remedy for personal injuries attributable to the negligence of state officials, Parratt v. Taylor would apply to deprivations of liberty in the same way it applies to deprivations of property. Thus, Parratt v. Taylor would bar Petitioner's claim if he had a meaningful post-deprivation remedy in state court. Third, a 6-3 majority of the en banc court held that Petitioner had a meaningful remedy in state court, despite the fact that Respondent, who was represented on the brief in the court of appeals by the Attorney General of Virginia, had asserted in both state and federal court that sovereign immunity would prevent any recovery by Petitioner against Respondent and counsel for Respondent explicitly declined during oral argument before the en banc court to concede that Petitioner could overcome a sovereign immunity defense in state court.

I. THE HOLDING OF A 5-4 MAJORITY OF THE EN BANC COURT OF APPEALS THAT A STATE PRISONER HAS NO CONSTITUTIONALLY PROTECTED INTEREST IN HIS BODY AND THAT THE CONSTITUTION PROTECTS HIM ONLY FROM INJURY TO TANGIBLE PROPERTY IS INCONSISTENT WITH THE ASSUMPTIONS MADE IN EACH OF THE OPINIONS OF THE JUSTICES IN PARRATT V. TAYLOR AND IS IN CONFLICT WITH EVERY OTHER COURT OF APPEALS.

The holding by the majority overturned the holding of the panel that "[b]odily injury resulting from a state official's negligence . . . deprives a person of a liberty interest protected by the fourteenth amendment." (App. II at 2). As Judge Phillips explained in his dissent, which was joined by three other members of the court below:

> I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. (App. I at 15-16)

Judge Phillips relied upon the several opinions issued by the Justices of this Court in Parratt v. Taylor:

> I do not believe that the critical principles that emerged from Parratt can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively ....
>
> All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. (App. I at 13).

Not only does the holding of the majority below conflict with this Court's own opinion in Parratt v. Taylor, but it also conflicts with every other holding on the point. See, e.g., Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) (bodily injuries received due to state trooper's negligence are liberty deprivations); Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (injuries suffered by pretrial detainee due to city officials' negligence are liberty deprivations); Brandon v. Allen, 719 F.2d 151 (6th Cir. 1983) (damages for injuries

received due to po_ se director's negligence i_ preventing an assault are not recoverable due to qualified immunity), cert. granted sub nom., Brandon v. Holt, 104 S. Ct. 2384 (1984); Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983) (extended prison term due to official's negligence in calculating sentence is a liberty deprivation); Holmes v. Ward, 566 F. Supp. 863 (E.D.N.Y. 1983) (injuries received after prison officers negligently failed to separate inmates represents a liberty deprivation); Junker v. Tinney, 549 F. Supp. 574 (D. Md. 1982) (burns received by inmate due to prison officials' negligence are liberty deprivations).

There is a division of authority as to whether liberty deprivations deny due process if a post-deprivation state remedy exists, which is discussed in connection with the second reason why Petitioner asks that his petition be granted. But there is no authority to support the position of the en banc majority that the Constitution affords no protection for injuries to the person of a prisoner who is under the custody, control and protection of state officers.

The only lower court case which has found that a nonproperty deprivation alleged to have resulted from the negligence of state officials did not amount to a liberty interest within the potential scope of § 1983 (depending on whether a meaningful post-deprivation remedy exists in state court) is Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), cert. denied, 104 S. Ct. 1325 (1984). This case is plainly distinguishable from the en banc court's holding below. In Jackson, the court held that a death that occurred after state officials negligently assisted a rescue is not a constitutional deprivation. 715 F.2d at 1206. The court stressed that the victim's own actions, wrecking her car, cause the harm, not the officials' failure to rescue. Id. at 1204. It reasoned that only "negative" liberty deprivations--the right to be left alone--as opposed to "positive" liberty deprivations--the right to receive protective services--are protected by the due process clause. Id. at 1203-04. Justices

White and Rehnquist dissented from the denial of the petition for certiorari. 104 S. Ct. 1325.

Assuming that Jackson is correct, it too supports the dissent in the instant case. Jackson plainly indicates that negligent infliction of injuries by state officials invades liberty interests.

Thus, the fourth circuit stands alone in its view of liberty interests. The majority opinion is inconsistent with every opinion in Parratt v. Taylor and is in conflict with all other lower courts. Petitioner asks this Court to grant his petition to reaffirm that liberty interests are no less valuable than property interests and that deprivations of liberty without due process violate the Fourteenth Amendment.

II. THE COURT OF APPEALS' UNANIMOUS HOLDING THAT, EVEN IF LIBERTY DEPRIVATIONS RECEIVE CONSTITUTIONAL PROTECTION, PARRATT V. TAYLOR EXTENDS EQUALLY TO LIBERTY AND PROPERTY INTERESTS AND BARS A SUIT UNDER § 1983 WHERE A STATE AFFORDS AN INJURED PRISONER A MEANINGFUL STATE COURT REMEDY EXACERBATES THE CONFUSION AMONG THE CIRCUITS AS TO THE SCOPE OF PARRATT.

This Court did not have occasion in Parratt v. Taylor to decide whether a suit brought under § 1983 for negligent deprivations of liberty interests may be maintained notwithstanding the availability of a meaningful state court remedy. Justice Blackmun's opinion, joined by Justice White, suggested that the majority opinion did not apply to deprivations of liberty or life. 451 U.S. at 545 (Blackmun, J., concurring). But other members of the Court expressed no opinion on the question.

The decision of the en banc court of appeals in the instant case exacerbates the confusion and division among the circuits. Indeed, it is fair to say that in some circuits there are internal divisions that produce inconsistent results.

Some circuits hold that liberty deprivations attributable to alleged misconduct on the part of state officers give rise to § 1983 actions only if a state fails to provide a meaningful remedy by way of a post-deprivation hearing. See, e.g.,

Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984) (Parratt applies to negligent deprivations of liberty); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("finding [a liberty] deprivation, the court must then determine whether the state procedures available for challenging the deprivation satisfy the requirements of due process"); Gilmere v. City of Atlanta, 737 F.2d 894, 905 (11th Cir. 1984) (court must decide if state's tort remedies satisfy procedural due process requirements); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983) (distinction between liberty and property is unimportant), rehearing en banc granted, 729 F.2d 613 (1984); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) ("Parratt . . . provides the guidance [for liberty deprivations] we must accept"), aff'd on other grounds sub nom., Kush v. Rutledge, 103 S. Ct. 1483 (1983).

Other circuits have refused to extend Parratt v. Taylor to some or all liberty deprivations. See, e.g., Wilson v. Beebe, 743 F.2d 342 348 (6th Cir. 1984) ("Parratt has no application where a negligent deprivation of life or liberty has been alleged"); Vail v. Board of Education, 706 F.2d 1435, 1441 (7th Cir. 1983) (Parratt does not control for intentional deprivations of liberty and property), cert. denied, 104 S. Ct. 2144 (1984); Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982) ("[W]e decline to give Parratt the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case"); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (Parratt does not apply to liberty interests), rev'd on other grounds, 461 U.S. 238 (1983).

The division in the circuits has caused district courts to differ on the proper treatment of claims that liberty interests have been damaged by negligent action on the part of state officers. Compare, e.g., Holmes v. Ward, 566 F. Supp. 863, 865 (E.D.N.Y. 1983) (Parratt not "per se inapplicable" to liberty claims) and Meshkov v. Abington Township, 517 F. Supp. 1280, 1286 (E.D. Pa. 1981) (plaintiff can seek remedy in state court) with Spallone v. Village of Roselle, 584 F. Supp. 1387, 1394 (N.D.

Ill. 1984) (intentional deprivations of liberty are actionable in federal court); Sager v. City of Woodland Park, 543 F. Supp. 282, 293 (D. Colo. 1982) (intentional and grossly negligent conduct that deprives life and liberty are actionable in federal court); and Howse v. DeBerry Correctional Institute, 537 F. Supp. 1177, 1180 (M. D. Tenn. 1982) (Parratt does not extend beyond negligent deprivations of property interests).

As Justice Rehnquist and Justice White observed in the dissent from the denial of certiorari in Jackson v. City of Joliet, 104 S. Ct. 1325 (1984), "[t]he inconsistent results below are attributable, at least in part, to the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort." Petitioner urges this Court to grant review in the instant case to remove the uncertainty as to the application of Parratt v. Taylor to deprivations of liberty interests.

III. THE MAJORITY'S DECISION TO AFFIRM THE DISMISSAL OF PETITIONER'S COMPLAINT--DESPITE RESPONDENT'S ASSERTION IN BOTH STATE AND FEDERAL COURT THAT SOVEREIGN IMMUNITY BARRED ANY STATE COURT RECOVERY AND THE FACT THAT THE ATTORNEY GENERAL OF VIRGINIA SUPPORTED THIS ASSERTION IN THE BRIEF BEFORE THE EN BANC COURT OF APPEALS--IS INCONSISTENT WITH THIS COURT'S APPROACH IN HUDSON v. PALMER, 104 S. CT. 3194, THREATENS TO BURDEN STATE AND FEDERAL COURTS WITH MULTIPLE LITIGATION OF THE SAME CASE, AND THREATENS TO MAKE THE CONCEPT OF A MEANINGFUL STATE REMEDY DEVELOPED BY THIS COURT IN PARRATT v. TAYLOR AN EMPTY CONCEPT.

Although the 6-3 majority that concluded that Virginia state courts offered a meaningful state remedy to Petitioner expressed a belief that Respondent's alleged acts were outside the scope of sovereign immunity, the majority could find no case in point. Moreover, the highest ranking legal official in the Commonwealth of Virginia, who appeared on behalf of Respondent on the brief apparently holds a different view. When asked whether Respondent would concede that sovereign immunity would not bar a state court recovery by Petitioner, Respondent's counsel told the en banc court that Respondent would not yield the sovereign immunity claim (App. IV at 10 n.1).

The en banc court heard argument in two other cases at the same time it heard Petitioner's case. The other cases, Ausley v. Mitchell and Poole v. Morris were decided together on the same day as Petitioner's case. The court's opinion is contained in Appendix IV. The authorities cited to the court of appeals by the Petitioner and the plaintiffs in the two other cases convinced three judges of the en banc court that sovereign immunity might well bar Petitioner's state court action. Writing an opinion concurring in part in the Ausley and Poole decision (App. IV at 12-13), Chief Judge Winter observed that the Virginia Supreme Court's opinion in Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983), appears to hold that even ministerial acts can be subject to a sovereign immuni*y defense. In Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983), the Virginia Supreme Court took the view that sovereign immunity may bar equitable actions as well as actions for damages.

With these cases raising concern, Judge Phillips' dissenting opinion, on behalf of himself and two other judges in Petitioner's case, argued that it was certainly impossible to say that Petitioner could find a remedy in state court even if he proved negligence. Judge Winter's opinion in the related cases read Parratt v. Taylor to require "the Commonwealth to offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke the rule of Parratt." (App. IV at 11 n.2) This is the approach Judge Phillips took in his dissenting opinion in Petitioner's case.

In response to the dissenters' concern about the emptiness of the theoretical state remedy, the majority cited two cases decided in 1808 and 1826 by the Virginia Supreme Court and dictum in one other case. (App. I at 9 n.5). The majority failed to observe that the Attorney General of Virginia supported the assertion of the sovereign immunity defense.

Were the assumption by the majority correct--i.e., that Petitioner could defeat a sovereign immunity claim in state court--Petitioner probably would have been able to pursue his

state court action to a conclusion, and the results of that action would have had res judicata effects that would bar any federal claim, even if Parratt v. Taylor is held to apply to liberty actions. The fact is, however, that it was the Commonwealth and the Respondent who raised sovereign immunity as a bar and who made the federal action necessary.

The effect of the court of appeals' decision is to leave Petitioner very probably without a remedy. His federal suit is barred, and his state remedy, according to the Respondent and his counsel, the Attorney General, also is barred. Thus, the majority below found a meaningful remedy where none exists.

This back-of-the-hand approach to state remedies departs dramatically from this Court's analysis in Hudson v. Palmer, 104 S. Ct. 3194 (1984). When this Court reaffirmed Parratt v. Taylor and extended it to intentional deprivations of property, the Court reiterated the requirement that a state must meet to satisfy the due process clause: it must provide a "meaningful postdeprivation remedy for the loss." Id. at 3204. This Court carefully examined Virginia law and concluded that a suit for intentional deprivation of property would lie. Id. at 3197 n.1 & 3205. This Court did what the majority of the court of appeals declined to do. As a result of the court of appeals' failure to insure that a state remedy exists for Petitioner, it left him very possibly cut off from all relief. In Parratt v. Taylor, 451 U.S. at 551 n.3 (Powell, J., concurring in the result), Justice Powell suggested that such a result would be inconsistent with the holding in Parratt. Hudson v. Palmer confirmed Justice Powell's suggestion. But a majority of the court of appeals departed from this Court's required analysis.

The court of appeals decision is inconsistent not only with this Court's opinions, but also with decision of other lower courts. Other courts have found that § 1983 claims must not be dismissed when sovereign immunity defenses in state courts would bar relief. See, e.g., Harper v. Scott, 577 F. Supp. 15 (E.D.

Mich. 1984); Junker v. Tinney, 549 F. Supp. 574, 579 (D. Md. 1982).

The damage to be expected from the decision below is considerable. This Court can see from the fact that in Petitioner's case, and in the two other cases argued below with his, the Commonwealth of Virginia takes a very broad view of sovereign immunity. The principal hope that a state prisoner had of persuading a state court to narrow the scope of sovereign immunity in order to give relief to injured prisoners, prior to the decision below against Petitioner, was reliance on § 1983 as an alternative remedy. State courts believed that if relief was barred in state courts, a federal suit could be brought. This belief might well have induced some state courts to give injured prisoners a remedy.

Following the decision against Petitioner, which holds that no remedy is required for negligent deprivations of liberty (which is discussed above), state courts now know that the court of appeals has held that a prisoner whose negligence claim might be sound can be denied a remedy in state court and the doors of the federal courthouse will remain closed. Surely, this was not what this Court intended in Parratt v. Taylor.

If this Court grants certiorari and agrees with Petitioner that a state prisoner who suffers bodily injury as a result of a state prison employee's negligence is entitled to a remedy, the Court certainly will want to address the knotty question raised by Judge Phillips' dissent: how can a federal court "determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity defense to the generally cognizable state-law claim." (App. I at 18). It must be undesirable for both state and federal courts to compel a prisoner to bring two actions and to litigate the first to completion in state court in order to see whether an official or sovereign immunity defense prevails, and if it does, to permit the prisoner to relitigate the action in federal court. Judge

Phillips suggested that dismissal of a § 1983 claim should be conditioned on abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not exist. (App. I at 19).

If Parratt v. Taylor is held to apply to deprivations of liberty, Petitioner would ask this Court to adopt a modification of Judge Phillips' approach that would bar a § 1983 action in federal court following the assertion of sovereign immunity as a defense in state court only where the defendant conclusively abandoned the defense in state court. To bar a § 1983 suit following a judicial judgment that sovereign immunity is an invalid defense raises the spec[illegible]e of a prisoner having to fight a case through the Virginia Su[illegible]me Court prior to knowing whether the defense applies. And should the Virginia Supreme Court hold that it does, the prisoner would then sue a second time, this time in federal court. Double litigation cannot benefit anyone, and Petitioner would ask this Court, if it finds that Parratt v. Taylor extends to liberty deprivations, to address the important question of federal-state relations and to resolve it in a way that eases the burden on prisoners as well as on state and federal cou[illegible]s.

CONCLUSION

Because Petitioner believes that the issues raised in this petition present important questions of federal law, that the court of appeals departed from decisions of this Court, and that lower courts are in conflict on the issues presented, he respectfully asks this Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully yours,

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APPENDIX I

Fourth Circuit En Banc Opinion

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-6538*

ROY E. DANIELS

Appellant

v.

ANDREW WILLIAMS, Deputy.

Appellee

Appeal from the Eastern District of Virginia, at Richmond, Richard L. Williams, District Judge. (CA 82-0106-R)

On Petition for Rehearing:

Argued: December 6, 1983 Decided November 16, 1984

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

Russell Williams, Third Year Law Student (Robert E. Shepherd, Jr., University of Richmond School of Law, Patricia L. Harrington, Third Year Law Student, on brief), Stephen Saltzburg, for Appellants; James W. Hopper, Alan Katz, Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia, on brief) for Appellees.

* This case was argued together with Ausley v. Mitchell, No. 82-6128, and Poole v. Morris, No. 82-6143.

WIDENER, Circuit Judge:

This case is an appeal from a judgment for the defendant in an action brought under 42 U.S.C. § 1983. We affirm.

Roy Daniels was a prisoner in the Richmond city jail on January 23, 1982, when he slipped and fell on a pillow and newspapers negligently left on some stairsteps by the defendant Williams, a deputy sheriff. The fall resulted in injuries to Daniels' back and ankle, for which he received medical treatment. While the facts surrounding Daniels' fall may be disputed, the district court found a common law negligence remedy available to Daniels and dismissed the case for failure to state a cause of action. Thus, for the purposes of this opinion, we assume that Daniels fell and that his fall was caused by Williams' negligence.

Daniels' suit must fail for two alternate reasons, either of which is fatal to his claim. The first is that we are of opinion Daniels' bodily injury occasioned by simple negligence was not a liberty interest protected by the due process clause.[1] Second,

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[1]There is no claim of any substantive due process violation. The facts here are not nearly aggravated enough to even make the proposition arguable. See, generally, Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

even if Daniels had a liberty interest violated by the negligence of Williams, then he had a remedy under the law of Virginia which satisfied the requirements of procedural due process.

I.

Parratt v. Taylor, 451 U.S. 527 (1981), decided that the negligent loss of two packages of hobby materials, belonging to one prisoner, and lost by a prison employee and another prisoner, was a deprivation of property under the Fourteenth Amendment. Parratt p. 536-537. The Court went on to decide, however, that because Nebraska provided a tort remedy as a means of redress for property deprivation, the deprivation was not without due process of law.

Until Parratt was decided, in this circuit a claim of mere negligence did not give rise to a cause of action under § 1983. We decided that explicitly in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), in which, however, we granted relief in a case where the defendant's actions were variously described to be gross and culpable, wanton and a raw abuse of power, but falling short of an intentional act. So our decision in Jenkins so far as property is concerned now gives way to Parratt.[2]

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[2]While the dissenting opinion's analysis of the majority's position, that of extraordinary reluctance to change circuit
(Footnote Continued)

We do not believe the Court intended Parratt to be applied automatically in a per se manner in every instance in which an act of negligence can also be stated as a § 1983 claim. The Court itself noted, at p. 534, quoting Baker v. McCollan, that "[T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action."

In Parratt, the concluding paragraph of the opinion of the Court took pains to explicitly disavow construing its decision so that it might result in "turning every alleged injury which may have been inflicted by a state official acting under 'color of

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(Footnote Continued)
precedent, may have been helpful in staking out its position, it sets up a strawman to disagree with. Of course the reasoning of Jenkins is not consistent with Parratt, as Parratt makes mere negligence actionable, while Jenkins requires more, and, of course, circuit precedent must give way to the superior authority of the Supreme Court. Even the suggestion that these propositions are not acknowledged by the majority is too far fetched to merit more than summary denial. But recognition of the fact that the result which Jenkins would obtain when applied to a negligent injury to the person happens to agree with the result required by Parratt in the same situation, indicates not a reluctance on the part of the majority to change circuit precedent, rather the failure of the dissent to acknowledge that Parratt and Jenkins require similar results on the same fact situation but for different reasons as the majority opinion indicates. We follow Parratt.

law' into a violation of the Fourteenth Amendment cognizable under § 1983." 451 U.S. at 544. The Court continued:

> "It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever circumstance may already be administered by the States.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." 451 U.S. at 544.

Thus, the Court, by explicitly rejecting a construction of its opinion which would permit maintaining a § 1983 claim for bodily injuries based on the negligent operation of an automobile by a state official acting under color of law, has limited its decision. Because we doubt that the Court intended to convey the impression that a prisoner suffering bodily injury from the negligence of a state official stands on a better footing than an ordinary citizen so injured, we think the Court intended to limit its decision to claims for the deprivation of property asserted by a prisoner, and we so hold. The difference in treatment between a prisoner's property and his person may easily be

justified. The demands of prison safety, life, and discipline make it obligatory for prison officials to have possession of, and search at some time or another, all of the property belonging to every prisoner. Prisons could be operated in no other fashion. Because the state of necessity has such complete control of the prisoner's property, calling it to account for the unexplained loss thereof is not inconsistent with demands of the Fourteenth Amendment. No such reasons exist, however, to set the prisoner above the ordinary citizen in the protection of his person. If the ordinary citizen may not sue under § 1983 a state employee who has negligently deprived him of a liberty interest by injury to his person, then the prisoner should not be allowed to prosecute a similar claim. The Supreme Court has expressed the same thought in a different context. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,"[3] neither should negligent injury to the person.

We are thus of opinion the negligent injury to the plaintiff's person is not a protectable liberty interest under the due process clause and the complaint does not state a cause of action under § 1983 on that account.

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[3] Estelle v. Gamble, 429 U.S. 97, 106 (1976).

II.

It is not disputed that in Virginia at all times here pertinent a common law tort action for negligence might have been maintained against a state employee performing ministerial duties. While the State is immune,[4] see James v. Jane, 221 Va. 43, 267 S.E.2d 108, 113 (1980), the employee is not. First Virginia Bank-Colonial v. Baker, 225 Va.___, 301 S.E.2d 8 (1983). The sovereign immunity which may attach to employees performing discretionary duties does not attach to those performing ministerial acts.

This was made clear in our recent case of Phelps v. Anderson, 700 F.2d 147 (4th Cir. 1983), and most recently, as we have noted above, by First Virginia Bank-Colonial in the state courts. In Phelps, prison employees had negligently deprived a prisoner of the use of his television set for a period of time. A prison adjustment committee had decided that the plaintiff owned the set and the prison employees' negligent failure to return the set to the rightful owner, we held, was an act in which they had no discretion, and accordingly, because that prisoner had the right to proceed under Virginia law, we held

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[4]Virginia recently enacted a Tort Claims Act, Va. Code § 8.01-195.1 et seq (Supp. 1982), which applies to acts occurring on or after July 1, 1982, and which surrenders the immunity of the Commonwealth for certain torts under specified conditions. That statute, of course, would have no effect in this case.

that Parratt barred his § 1983 claim. In First Virginia Bank the suit was against the clerk of a court whose deputy had negligently indexed a deed of trust on the wrong page of the index book. The Virginia court held that act to be ministerial and allowed a suit to proceed against the clerk on account of the negligence of the deputy.

In the case at hand, there is no claim that the deputy sheriff, Williams, was exercising any discretionary duty when he left the pillow on the stairsteps, so his actions at the most, looking at the case in the best light from Daniels' side, were merely ministerial. Because Williams' duties were ministerial, it was possible for Daniels to maintain an action in the Virginia courts on account of his injury without being met with the defense of sovereign immunity. Thus, even if Daniels were deprived of a liberty interest protected by the Fourteenth Amendment, the deprivation was not without due process of law under Parratt because a post-deprivation remedy was available in the state courts.

The plaintiff argues that sovereign immunity is available to Daniels as a defense, and it follows, the argument goes, that if sovereign immunity is available as a defense, any remedy he may have under state law may be inadequate and not in fact a remedy. The defendant argues that any immunity which may exist under state law is little different from the immunity afforded state

officials in the federal courts in suits under § 1983, and continues that since the immunities involved are akin, even if not the same, then the existence of immunity should not serve to permit the suit to be maintained. Because we believe there is no significant difference in the duties of the deputy sheriff in this case, the prison officials in Phelps, and the deputy clerk of the court in Baker, we think the duties of Williams were ministerial and do not reach the question of whether or not the existence of a possible immunity defense should permit the action to be maintained under § 1983.[5]

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[5]We have grave doubt that the immunity question, whether the acts complained of were discretionary or ministerial, has any proper place in this case in any event, since the case involves a sheriff and not some other public employee or officer. In Dabney v. Taliaferro, 25 Va. (4 Rand.) 256 (1826), the court held that a sheriff was held to a standard of ordinary care ("omission and neglect" was the exact phraseology) in the keeping of a prisoner by a contract jailer. If a suit may be maintained against a sheriff directly, it could probably be maintained against a deputy, and, even if not, the remedy afforded against the sheriff would satisfy the requirements of Parratt.

Our position with respect to this matter is supported by the statement in First Virginia Bank that ". . .we find no logic in a rule that exempts him [a clerk of the court] from the doctrine of respondeat superior whether the wrong committed by his deputy is discretionary or ministerial in character." 301 S.E.2d at p. 12. First Virginia Bank also noted with approval Moore's Adm. v. Dawney, et al., 13 Va. (3 H.&M.) 127 (1808), and the statement in that case that "[t]he law looks upon the sheriff and his officers as one person; he is to look to his officers that they do their duty; for if they transgress, he is answerable to the party injured by such transgression; and his officers are answerable over to him." 13 Va. (3 H.&M.) at p. 132; 301 S.E.2d at p. 11, n. 3.

(Footnote Continued)

The judgment of the district court is

AFFIRMED.

(Footnote Continued)

Because the parties have not approached the case from this angle, we express no opinion on the subject, but, to repeat, whether or not there is necessarily any immunity question in the case seems doubtful.

PHILLIPS, Circuit Judge, dissenting in part
and concurring in part:

The majority affirms dismissal of Daniels's claim under 42 U.S.C. § 1983 on alternative grounds. First, that as a matter of general principle there is no constitutionally protected liberty interest in being free of bodily injury caused by merely negligent, as opposed to intentional, conduct of state agents, or, put differently, that the merely negligent infliction of bodily injury by a state agent does not constitute "deprivation" of any constitutionally protected liberty interest; second, that even if such an interest in general exists, or such a deprivation might in general occur, any deprivation occurring here was not without due process because the state provides an adequate post-deprivation remedy for Daniels in the form of a traditional common law personal injury negligence action. Since § 1983 requires proof both that there has been deprivation of a constitutionally protected liberty (or property) interest and that it shall have occurred without due process, no cognizable § 1983 claim is here stated.

I disagree with the first ground.

On the second, I agree that with respect to the kind of negligent deprivation of liberty interest here involved a state's post-deprivation tort remedy may provide the process constitutionally due; but I do not believe that due process is provided if a sovereign immunity defense is available to bar

the state's post-deprivation remedy. And because I do not believe that on the record before us we can determine whether that defense is so available, I would only affirm dismissal of this § 1983 claim on condition that it might be reinstated if the defense is drawn upon to bar his state claim in state court.

I therefore dissent to the outright dismissal mandated by the majority.

I

As I understand the majority's reasoning on the first ground - that there is no constitutionally protected liberty interest in being free of bodily injury inflicted negligently by state agents - it runs as follows. Until Parratt v. Taylor, 451 U.S. 527 (1981), decided that one could be "deprived" of a constitutionally protected property interest by negligent conduct of state agents, the law of this circuit had been that only intentional conduct could "deprive" of either property or liberty interests. Parratt decided only that one might be so deprived of property interests; hence prior circuit law respecting the deprivation of liberty interests is unaffected by intervening Supreme Court authority and remains that one may not be so deprived of liberty interests. By implication, circuit law on liberty interests should not in this case be brought into conformity with Parratt's new dispensation as to property interests, because

there are rational bases for maintaining the distinction first necessitated by Parratt.

With respect, I simply disagree with this analysis.

First off, I do not believe that the critical principles that emerged from Parratt can be read as being narrowly confined to property interests. It is true that the case was about a property interest so that the specific holding is so limited, but the threshold issue identified and addressed in the majority opinion was "whether mere negligence will support a claim for relief under § 1983," 451 U.S. at 532. And this issue was answered affirmatively, if somewhat obliquely, in the same broad terms in which it was put by the Court: "§ 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." 451 U.S. at 535.

All of the other Justices writing in the case assumed that a necessary implication of the majority's holding on this point was that it applied to liberty as well as property interests. Justice Powell, concurring, was principally concerned that "deprivation" should not be construed to cover any but intentional acts, and he unmistakably assumed, as his references show, that the Court's opinion applied to deprivations of liberty as well as property interests. 451 U.S. 546-554 & nn.6, 7, 9. Justice Stewart, concurring, also plainly

assumed that the majority's specific holding that deprivations of property might be by negligent conduct necessarily would apply in logic as well to deprivations of liberty. 451 U.S. at 544-45 (Stewart, J., concurring). Justice Blackmun, concurring, joined by Justice White, was only concerned that the majority's post-deprivation remedy analysis should be confined to property cases and not extended to claimed deprivations of life or liberty, clearly assuming that deprivation of either might be by negligent or intentional conduct. 451 U.S. at 545-46.

I therefore believe that whatever may have been the pre-Parratt state of circuit law, Parratt made it plain as national law that whether challenged conduct was negligent or intentional is irrelevant to the threshold § 1983 question whether it was committed under color of state law and whether it deprived a person of federally secured rights, see Parratt, 451 U.S. at 535, and that this is true whether the rights allegedly violated involved property or liberty interests.[1]

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[1] The majority here relies heavily on the Parratt majority's specific expression of concern about § 1983 being extended to cover "an automobile accident with a state official," see 451 U.S. at 544, as showing an intention by that Parratt Court to confine its "deprivation by negligence" holding to cases involving property interests. But the language quoted occurs in a passage laying out a general justification for finding in state post-deprivation remedies an appropriate means by which to prevent § 1983's extension to all negligence cases. Indeed, the Parratt Court's hypothetical automobile accident could presumably have given rise both to property damage and personal injury claims; the Court is saying that both are being kept out of § 1983's reach by the post-deprivation remedy solution.

Furthermore, I doubt that it is accurate to suggest that before Parratt, this circuit had never recognized any § 1983 claim based on mere negligence. Certainly we had recognized such claims in the congruent eighth amendment context. See, e.g., Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), cert. denied, 449 U.S. 827 (1980) (negligent failure to protect prison inmate against known threats of physical harm).[2]

Finally, with all deference, I simply cannot accept the majority's apparent holding that somehow the fourteenth amendment imposes a more stringent duty upon the states to avoid

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[2] The majority says that in Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970), we had decided explicitly that a claim of "mere negligence" did not give rise to a cause of action under § 1983. With all deference, I suggest that the language referred to in Jenkins was dicta that has necessarily been treated as such in later pre-Parratt cases such as Withers. See also McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972) (Sobeloff, J.) (holding that "a section 1983 action may be based on negligence when it leads to a deprivation of rights," citing Jenkins).

The specific holding in Jenkins was that the non-intentional infliction of harm there in issue was cognizable in § 1983 because of its particular quality of wantonness and degree. This was thought to amount to a "substantive due process" violation, and the language referred to by the majority was simply setting in contrast negligent inflictions of harm not rising to that level. In retrospect, Jenkins and other pre-Parratt substantive due process decisions are properly seen as harbingers of the principle that for some deprivations of secured interests - including those caused by "mere negligence" - post-deprivation state remedies may supply the process constitutionally due that makes them not cognizable under § 1983. Thus the holdings of those cases are not that "mere negligence" can never deprive of constitutionally secured interests and thus support cognizable § 1983 claims, but that some such deprivations are of such a character that no state post-deprivation remedy could constitute due process. See Palmer v. Hudson, ___ U.S. ___, ___, 52 U.S.L.W. 5052, 5058 n.4 (U.S. July 3, 1984) (Nos. 82-1630 and 82-6695) (Stevens, J., concurring).

deprivations of the property than the liberty interests of either their prison inmates or citizens in their free societies. If there is a constitutional scale of values associated with the two kinds of interests, the majority's analysis seems to me to stand on its head the obvious rank order that would be assigned them. See Parratt, 451 U.S. at 542 (suggesting that an intentional deprivation of liberty interests is "arguably . . . more egregious" than a negligent deprivation of property interests); id. at 545 (Blackmun, J., concurring) (suggesting that deprivations of liberty interest might not be adequately remedied by state post-deprivation process though deprivations of property interests could be). Certainly in purely human terms it would be difficult to suppose that the Constitution assigned less value to the concededly modest bodily harm allegedly suffered in this case than the Supreme Court in Parratt held that it assigned to the loss of a $23.50 hobby kit.

I would therefore hold, contrary to the majority, that Daniels's complaint states a cognizable § 1983 claim that he was deprived of a liberty interest by the defendant acting under color of state law. This would then lead to the question whether the complaint had also sufficiently alleged that the deprivation was without due process.

II

On the due process question, I think it plain that Parratt's principal holding that a state's post-deprivation remedies may supply the due process that suffices to defeat an otherwise cognizable claim of rights deprivation under § 1983 applies to liberty as well as property interests. Indeed, the general principle had already been established in the pre-Parratt liberty interest case of Ingraham v. Wright, 430 U.S. 651 (1977) (school paddling), a point the Parratt Court expressly recognized and relied upon. See Parratt, 451 U.S. at 542 (court's post-deprivation remedy analysis asserted to be "quite consistent with the approach taken . . . in Ingraham"). Accordingly, I accept that Virginia's ordinary tort remedies (irrespective of any special state Tort Claims Act remedies later provided) might supply the due process that would defeat a § 1983 claim such as Daniels's.

But I would hold that if under state law the defendant in this case could avoid liability on Daniels's state-law claim by the defense of sovereign immunity, the state's post-deprivation remedy does not provide for Daniels the adequate state remedy required to defeat his § 1983 claim on Parratt/Ingraham grounds. See Parratt, 451 U.S. at 551 n.9 (Powell, J., concurring).3/

(Footnote 3 on next page)

III

But this in turn, then leads to the difficult question of how, in this or any case, a federal § 1983 court is to determine whether an otherwise adequate post-deprivation state remedy is made inadequate because of the possible availability of a sovereign immunity, or other official immunity, defense to the generally cognizable state-law claim. Of course, no problem would exist where state law on the point is clear, or is stipulated, or possibly where the defense though available is waived for a particular case. But that, regrettably, is not the case we have. Here, the availability and scope of the defense is by no means clear on the record before us.[4]

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[3] The state suggests that even if sovereign immunity is available to defeat a parallel state tort claim, this cannot be held to negate the adequacy of the state's post-deprivation remedy as due process, given the fact that the availability of a qualified immunity defense to § 1983 claims is not thought to raise any due process questions. There is an element of plausibility in this, but I think it could present a serious question only if the available state immunity defense were no broader than the qualified immunity defense under § 1983. There is no suggestion here of that, and the question can therefore be reserved for another day.

[4] The majority avoids specific decision on this issue by assuming that if the existence of a sovereign immunity defense could make a state's post-deprivation process inadequate for § 1983 purposes, no such defense would be available under state law to the defendant here, either because the duties in question were ministerial or because no sovereign immunity defense is available to a sheriff (or his deputy) as distinguished from other state officials. For reasons explained in Judge Winter's opinion in the companion cases, No. 82-6128, Ausley v. Mitchell and No. 82-6143, Poole v. Morris, and because of

(Continued on next page)

And indeed, the problem is aggravated here by the fact that though the Commonwealth argues before us that the state remedy is not made inadequate by that means, we are told that in the parallel state action it has raised sovereign immunity as a defense.

In this situation, I believe that the only fair course for a federal § 1983 court - certainly the only fair one for the claimant - is to condition dismissal of the § 1983 action on the abandonment or waiver by the state of any sovereign immunity defense it might assert, or the entry of an authoritative judgment by the state court that the defense does not bar the claimant's state claim.

Accordingly, I would remand to the district court with instructions to dismiss on those conditions, leaving to claimant the right to reinstate his § 1983 claim upon the entry of any judgment in his state action holding his state claim barred by sovereign immunity.

(fn. 4 continued)
the state's litigation positions in this and the parallel state action, I do not believe that the assumption that no sovereign immunity defense will be available in the state action can - in fairness to claimant - be indulged by this court as the basis for dismissal.

Judge Winter and Judge Murnaghan authorize me to say that they join in this opinion. Judge Ervin authorizes me to say that he concurs in part I of this opinion.

ERVIN, Circuit Judge, concurring in part and dissenting in part:

I concur in Part II of the majority opinion and in the decision to affirm the judgment of the district court.

I am unable, however, to accept the rationale contained in Part I of the majority opinion, and I respectfully dissent therefrom, for the reasons cogently stated by Judge Phillips in Part I of his dissenting opinion, in which I join.

APPENDIX II

Fourth Circuit Panel Opinion

Ray E. DANIELS, Appellant,

v.

Andrew WILLIAMS, Deputy, Appellee.

No. 82-6838.

United States Court of Appeals, Fourth Circuit.

Argued May 13, 1983.

Decided Aug. 24, 1983.

Inmate brought civil rights action against deputy sheriff to recover for injuries sustained when he slipped and fell on a pillow left on stairs by the deputy. The United States District Court for the Eastern District of Virginia, Richard L. Williams, J., granted deputy's motion for summary judgment, and inmate appealed. The Court of Appeals, Turk, Chief District Judge, sitting by designation, held that: (1) United States Supreme Court decision providing that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where property deprivation does not result from established state procedure and state cannot practically provide a meaningful predeprivation hearing applies also to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivation of the liberty interest in freedom from bodily injury, and (2) inmate's allegation that he was injured when he slipped and fell on a pillow negligently left on stairs by deputy sheriff failed to state a procedural due process claim, because state's common-law tort action provided inmate with a remedy which would fully compensate him for alleged liberty deprivation, despite the possibility of a sovereign immunity defense.

Affirmed.

1. Civil Rights ⇐13.9

Exhaustion of state judicial or administrative remedies is not a prerequisite to a section 1983 action, except for those cases falling under the narrow exhaustion scheme embodied in provision governing civil action brought on behalf of institutionalized persons. 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 2, 42 U.S.C.A. § 1997.

2. Constitutional Law ⇐254.1

"Liberty" within the meaning of the Fourteenth Amendment includes the right to be free from unjustified intrusions on personal security, and therefore, bodily injury resulting from a state official's negligence deprives a person of a liberty interest protected by the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐254.1

United States Supreme Court decision providing that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where property deprivation does not result from established state procedure and state cannot practically provide a meaningful predeprivation hearing applies also to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivation of the liberty interest in freedom from bodily injury. U.S.C.A. Const.Amend. 14.

4. Civil Rights ⇐13.9

In cases involving alleged violations of substantive constitutional rights, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. 42 U.S.C.A. § 1983.

5. Constitutional Law ⇐268(3)

While due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, it does not entitle every civil litigant to a hearing on the merits in every case; rather, due process requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. U.S.C.A. Const.Amend. 14.

6. Constitutional Law ⇐268(1)

Sovereign immunity does not itself violate due process. U.S.C.A. Const.Amend. 14.

7. Civil Rights ⇐13.12(7)

Inmate's allegation in civil rights complaint that he was injured when he slipped and fell on a pillow negligently left on stairs by deputy sheriff failed to state a procedural due process claim, because state's common-law tort action provided inmate with a remedy which would fully compensate him for the alleged liberty deprivation, despite the possibility of a sovereign immunity defense. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

Louis James Lisnia, Third Year Law Student (Professor Stephen A. Saltzburg, University of Virginia Law School, Charlottesville, Va., on brief), for appellant.

Dennis A. Barbour, Roanoke, Va. (James W. Hopper, Gardner, Moss, Brown & Hopper, P.C., Roanoke, Va., on brief), for appellee.

Before HALL and SPROUSE, Circuit Judges, and TURK,* Chief Judge.**

TURK, Chief Judge:

Roy E. Daniels (Daniels), an inmate at the Richmond City Jail, brought this section 1983 action against Deputy-Sheriff Andrew Williams (Williams) alleging that he was injured when he slipped and fell on a pillow negligently left on the stairs by Williams. The district court granted Williams's motion for summary judgment, reasoning that under *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), Daniels's allegations failed to state a procedural due process claim because Virginia provided a meaningful postdeprivation remedy in the form of a common law negligence action. Daniels appeals on the grounds that *Parratt*'s analysis concerning the adequacy of a postdeprivation remedy should not be applied to the deprivation of a nonproperty interest, and, even if it does apply, that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. We affirm the district court's dismissal of Daniels's action.

A.

[1] The plaintiff in *Parratt* alleged that he was deprived of property without due process of law when prison officials negligently lost his hobby kit. The Court agreed that the plaintiff had been deprived of property within the meaning of the fourteenth amendment. *Id.* at 536-537, 101 S.Ct. at 1913-1914. The Court held, however, that the plaintiff had not stated a claim for a violation of the due process clause of the fourteenth amendment. Rejecting the proposition that due process always requires a hearing before the initial property deprivation, Justice Rehnquist stated in a plurality opinion that a meaningful postdeprivation hearing satisfies the requirements of procedural due process in situations where the property deprivation does not result from established state procedure and the state cannot practically provide a meaningful predeprivation hearing. *Id.* at 540-541, 101 S.Ct. at 1915-1916. Applying this principle to the plaintiff's allegation that he was tortiously deprived of his property as a result of a state employee's random and unauthorized act, the Court concluded that the plaintiff was not deprived of property without due process of law because the state's statutory tort procedure provided him with a postdeprivation remedy that satisfied the requirements of procedural due process.[1] *Id.* at 543-544, 101 S.Ct. at 1916-1917.

[2] Like the plaintiff in *Parratt*, Daniels alleges that he was injured by the negligence of a state employee. Unlike in *Parratt*, Daniels's claim is for bodily injury rather than for the loss of personal property. "Liberty" within the meaning of the fourteenth amendment includes the right to be free from "unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Bodily injury resulting from a state official's negligence therefore deprives a person of a liberty interest protected by the fourteenth amendment.[2] This case thus presents the question whether the *Parratt* analysis applies to nonproperty deprivations, such as a negligent deprivation of a liberty interest.

[3] *Parratt* concerned a property interest; its scope, however, "cannot easily be limited to negligent deprivations of property." *Palmer v. Hudson*, 697 F.2d 1220, 1222 (4th Cir.1983), *cert. granted*, — U.S. —, 103 S.Ct. 3555, 77 L.Ed.2d 1396 (1983). Because *Parratt*'s underlying principle is that a postdeprivation hearing will satisfy procedural due process when there is no practical way to provide a predeprivation hearing, logic dictates that *Parratt* should also apply to a nonproperty deprivation for which a predeprivation hearing was impractical. Justice Rehnquist made no distinction in *Parratt* between property and nonproperty deprivations. Rather, the relevant distinction is between isolated acts of misconduct which are not amenable to prior control and deprivations resulting from established state procedure; this factor determines whether a meaningful postdeprivation remedy will satisfy the requirements of procedural due process.

In addition, application of *Parratt* to nonproperty deprivations such as Daniels's alleged bodily injury is consistent with the Court's stated goal in *Parratt* to provide courts with assistance in determining "the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of constitutional deprivation and relief is sought under

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* Honorable James C. Turk, Chief United States District Judge for the Western District of Virginia, sitting by designation.

** Judge Sprouse was not present during oral argument; however, counsel agreed that he could participate by listening to the tapes.

1. Exhaustion of state judicial or administrative remedies is not a prerequisite to section 1983 actions, *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), except for those cases falling under the narrow exhaustion scheme embodied in 42 U.S.C. § 1997. *See Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). *Parratt* does not change this rule. An exhaustion requirement would merely require a plaintiff to exhaust his state remedies before bringing a section 1983 action in federal court. *Parratt*, by contrast, stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Unlike an exhaustion requirement, which is based upon principles of comity, the *Parratt* analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

2. Some bodily injuries also implicate a protected property interest, as is recognized by the existence of a common law tort action to recover damages for negligently caused personal injuries. However, because *Parratt* expressly op-

§ 1983." *Id.* 451 U.S. at 530, 101 S.Ct. at 1913.

The conclusion that *Parratt* was intended to apply to all types of deprivations resulting from the unauthorized acts of state officials which are not amenable to prior review is further reinforced by the concurring opinion of Justice Powell. Justice Powell argued that the alleged negligent loss of the plaintiff's property by the state officials did not constitute a deprivation of property within the meaning of the fourteenth amendment. *Id.* at 546, 101 S.Ct. at 1918. And he criticized the Court's focus on the adequacy of the postdeprivation remedy because such would make the fourteenth amendment a font of tort law whenever a state failed to provide a remedy. *Id.* at 550, 101 S.Ct. at 1920. In so doing, however, he recognized that the Court's analysis applies to "negligent invasions of liberty or property interests." *Id.*

Moreover, *Ingraham v. Wright*, *supra*, is cited by the Court as being consistent with the approach taken in *Parratt*. 451 U.S. at 542 and 547, n. 1, 101 S.Ct. at 1916 and 1919, n. 1 (Powell, J., concurring in result). In *Ingraham*, the Court addressed the claim that corporal punishment in public schools violated due process. *See* 430 U.S. at 653, 97 S.Ct. at 1408. The Court held that corporal punishment in public schools did not deprive school children of liberty without due process of law because, among other things, "the traditional common-law remedies are fully adequate to afford due process." *Id.* at 672, 97 S.Ct. at 1418. *Parratt*'s citation of *Ingraham* with approval is compelling evidence that the Court intended the *Parratt* analysis to apply to deprivations of liberty interests.

Not all the justices who joined in the Court's decision in *Parratt* believed that it applied to nonproperty deprivations. Justice Blackmun, with whom Justice White concurred, did "not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty." 451 U.S. at 545, 101 S.Ct. at 1918. But Justices Blackmun and White offered no persuasive reason for their distinction between property and nonproperty deprivations. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), cited as different yet analogous precedent supporting this distinction, concerned a substantive due process claim, *see id.* at 502–03, 97 S.Ct. at 1937–38, and thus is distinguishable from cases, such as this one, involving alleged procedural due process violations.

Although Daniels concedes that not every liberty deprivation by a state official should be redressed by an action under section 1983, he stresses that the state has an affirmative duty to protect inmates because of the high level of state control in the prison environment. And he argues that *Parratt*'s analysis should not apply to this case because a section 1983 remedy is the only way to ensure the state's compliance with this duty. We believe, however, that the Virginia courts are no less diligent than the federal courts in protecting inmates from state inflicted harm. Moreover, there is nothing in *Parratt* which lends support to the proposition that its rationale applies differently to prisoners than to nonprisoners. Indeed, the fact that the plaintiff in *Parratt* was himself an inmate militates against the adoption of Daniels's proffered distinction.

[4] Therefore, we hold that the *Parratt* analysis applies to deprivations of nonproperty interests which do not violate substantive constitutional rights, including negligent deprivations of the liberty interest in freedom from bodily injury. *See Ellis v. Hamilton*, 669 F.2d 510 (7th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 466, 74 L.Ed.2d 621 (1982); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, — U.S. —, 103 S.Ct. 1483, 75 L.Ed.2d 418 (1983).[5]

Daniels alleges that Williams's negligence in leaving a pillow on the stairs deprived him of a liberty interest. There is no allegation that Daniels was injured as a result of some established state procedure. Nor was it possible for the state to provide a predeprivation hearing since the state could not predict when the alleged loss would

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plies to negligent property deprivations, our analysis will focus on Daniels' claim that he was deprived of liberty without procedural due process.

5. *See also Hickman v. Hudson*, 697 F.Supp. 1341 (W.D.Va.1983); *Jeanlar v. Tinney*, 540 F.Supp. 574 (D.Md.1982); *Holman v. Wampler*, 548 F.Supp. 903 (E.D.Va.1982); *Henderson v. Counts*, 544 F.Supp. 149 (E.D.Va.1982); *Peery v. Davis*, 524 F.Supp. 107 (E.D.Va.1981); *Steele v. Rosenfeld*, 524 F.Supp. 515 (N.D.Ill. 1981); *Maddox v. Abington Township*, 517 F.Supp. 1350 (E.D.Pa.1981); *but see Moore v. Duxbury Correctional Institute*, 537 F.Supp. 1177 (M.D.Tenn.1982); *Hayground v. Vinzant*, 537 F.Supp. 698 (E.D.Cal.1981).

We emphasize that our holding today is not intended to expand *Parratt*'s scope to every section 1983 action which resembles a state tort action. *Parratt* applies to only procedural due process claims involving deprivations that do not result from established state procedures and for which the state cannot practically provide a predeprivation hearing. Section 1983 still provides a remedy for procedural due process violations resulting from some established state procedure or for which a prior hearing is practical. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434–437, 102 S.Ct. 1148, 1157–1159, 71 L.Ed.2d 265 (1982), and for violations of substantive constitutional rights. *See Palmer*, 697 F.2d at 1333, n. 2. For example, *Parratt* is inapplicable to eighth amendment claims aris-

error. Consequently, *Parratt* applies to this case.

B.

Having decided that *Parratt* applies to this case, we must next determine whether Daniels has been deprived of liberty without due process of law. This in turn requires an evaluation of whether Virginia law provides him with a meaningful postdeprivation remedy.

Virginia law provides Daniels with a common law action for negligence.[4] Nevertheless, Daniels erroneously argues that the Virginia doctrine of sovereign immunity denies him an adequate postdeprivation remedy. *See Sabina v. Hutton*, No. 81-225-A.M (E.D.Va. Nov. 17, 1982) (unpublished).

In his answer, Williams invoked the defense of sovereign immunity from liability for his alleged negligence. The Supreme Court of Virginia has "listed certain factors to consider in determining whether a state employee is entitled to immunity when he or she is charged with simple negligence in the performance of some duty." *Bowers v. Commonwealth, Dept. of Highways and Transportation*, — Va. —, —, 302 S.E.2d 511, 514 (1983).

> Under such circumstances, [a court should] examine the function [the] employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative .... Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved.

James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

Daniels alleges that Williams negligently left a pillow on the stairway. Applying the ministerial-discretionary factor, a state court could overrule Williams's plea of immunity because (1) "most negligence underlying Daniels's claim was misfeasance of a ministerial duty. *See Phelps v. Anderson*, 700 F.2d 147, 149 (4th Cir.1983); *Bender v. Psychiatric Institute*, 588 F.2d 121, 127 (4th Cir.1978); *First Virginia Bank-Colonial v. Baker*, — Va. —, 301 S.E.2d 8 (1983); *Lawhorne v. Harlan*, 214 Va. 435, 200 S.E.2d 569 (1973). On the other hand, the state's interest and involvement in prison administration is great, and a state court may thus determine that Williams is entitled to immunity. *See Dukes v. Hutto*, No. LD 1181, Vol. 8, No. 1 VADA Quarterly 15 (Cir.Ct. Richmond, Nov. 29, 1982). In short, we cannot confidently predict whether sovereign immunity would apply in this case. Consequently, we must determine whether the possibility of a sovereign immunity defense deprives Daniels of an adequate postdeprivation remedy.

In responding to the argument that Nebraska's tort claims procedure did not adequately protect the plaintiff's property interest because it did not provide him with all the relief available in actions brought under section 1983, the Court held in *Parratt* that the state remedies were sufficient to satisfy the requirements of due process because the "remedies provided *could have* fully compensated the [plaintiff] for the property loss he suffered." 451 U.S. at 544, 101 S.Ct. at 1917 (emphasis added). Thus, *Parratt* does not require that a plaintiff actually receive a remedy for the deprivation of his interest. Instead, *Parratt* holds that procedural due process is satisfied if, in cases where a predeprivation hearing is impractical, the state provides a means by which the plaintiff can be compensated for his loss. In other words, under *Parratt* the requirements of due process are satisfied by the provision of a hearing before a tribunal with the power to grant a remedy. *See Grove v. Coe*, 559 F.Supp. 772 (E.D.Va. 1983).

[3] Daniels contends, however, that he is denied due process under *Parratt* because he could be precluded from bringing any claim in any court if his section 1983 action is dismissed and Williams's plea of immunity is sustained. While we agree that this result could deprive Daniels of a remedy, it does not follow that it would deprive him of his right to present a claim and be heard. To be sure, Daniels will be unable to litigate the merits of his claim if a state court determines that Williams is entitled to sovereign immunity. But while due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, *see Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), it does not entitle "every civil litigant to a

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ting out of a state official's *medical* malpractice or negligence which amounts to deliberate indifference to serious health and safety needs of prisoners. *See generally Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Withers v. Levine*, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 848, 101 S.Ct. 136, 66 L.Ed.2d 59 (1980). Similarly, *Parratt* would not apply to substantive due process violations resulting from a police officer's unjustified, brutal beating of a suspect, *see Henderson v. Cousins*, 560 F.Supp. at 152–153, or grossly negligent shooting of a suspect which amounts to a "conscience shocking" use of power. *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir.1970). In these kinds of cases involving alleged violations of substantive constitutional rights, therefore, the presence or absence of a state remedy is irrelevant to whether a claim is stated under section 1983. Consequently, before dismissing a section 1983 action under *Parratt*, a court should scrutinize the complaint to ensure that it does not include allegations of violations of substantive constitutional rights in addition to an allegation of a procedural due process violation. *See generally Hickman v. Hudson*, *supra*; *Jennifer v. Tinsley*, *supra*; *Hudson v. Wampler*, *supra*; *Henderson v. Cousins*, *supra*.

4. Daniels's alleged injury occurred on January 23, 1982. The Virginia Tort Claims Act, Va. Code § 8.01–185.1 *et seq.* (Supp.1982), applies only to actions accruing on or after July 1, 1982. Under the Act, Virginia is made liable for negligent acts or omissions of state employees, but "[n]otwithstanding any provisions [of the Act], the individual immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons are presently immunized." Va.Code § 8.01–195.3 (Supp.1982).

hearing on the merits [a ... ity case." *Id.* at 488, 108 S.Ct. at 1188. Rather, due process requires "an opportunity ... granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case ...." *Id.*, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (citations omitted). And we conclude that Virginia's common law tort action provides Daniels with a meaningful opportunity for a hearing appropriate to the nature of his claim.[5]

[6] Nor does sovereign immunity itself violate due process. "For when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Parratt v. Ackerman*, 466 U.S. 108, 108, 100 S.Ct. 468, 468, 62 L.Ed.2d 388 (1979); *see Martinez v. California*, 444 U.S. 277, 280-283, 100 S.Ct. 553, 556-558, 62 L.Ed.2d 481 (1980).

[7] Daniels further argues that the doctrine of sovereign immunity deprives him of a postdeprivation remedy at a meaningful time and in a meaningful manner. *See* 451 U.S. at 540, 101 S.Ct. at 1915. He asserts that, unlike litigation on the question of good faith in a section 1983 action, which is determined only after a full hearing on the merits, litigation on the issue of sovereign immunity precludes a hearing on the merits unless and until the plea of immunity is overruled. This may be true insofar as a determination of whether sovereign immunity applies is compared with a determination of whether qualified immunity applies in a section 1983 action. *But see Harlow v. Fitzgerald*, 457 U.S. 800, 817-819, 102 S.Ct. 2727, 2738-2739, 73 L.Ed.2d 396 (1982). Nevertheless, this argument overlooks the fact that due process is not violated by other affirmative defenses, such as the statute of limitations, which must be decided prior to litigation on the merits. And contrary to Daniels's assertion, he is no more denied a remedy at a meaningful time and in a meaningful manner by the chance that he may be required to litigate the question of sovereign immunity through the entire Virginia court system than he would be by having to appeal an adverse ruling on a plea of the statute of limitations. We therefore see no significant distinction between sovereign immunity and other defenses which persuades us that Daniels is denied an adequate postdeprivation remedy by the possibility that Williams may be entitled to immunity.

In sum, Virginia's common law tort action provides Daniels with a remedy which can fully compensate him for the alleged liberty deprivation. Thus, despite the possibility of a sovereign immunity defense, we hold that Daniels possesses a remedy which provides him with a "meaningful opportunity for a determination of rights and liabilities." 451 U.S. at 541, 101 S.Ct. at 1916. Consequently, we conclude that Daniels has failed to state an actionable claim under section 1983 because he has not been deprived of liberty without due process of law.

The judgment of the district court is AFFIRMED.

5. Our conclusion, of course, would be different if Virginia's sovereign immunity doctrine had the effect of depriving a prisoner of the right to bring a claim in state court and he based on the issue of sovereign immunity. *See Parratt*, 451 U.S. at 541, n. 5, 101 S.Ct. at 1915, n. 5 (Powell, J., concurring in result).